Supreme Court, U. S.
FILED
FEB 19 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1178

ALPHONSE INDELICATO,

Petitioner,

-against-

THE NEW YORK STATE BOARD OF PAROLE.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ARNOLD E. WALLACH
Attorney for Petitioner
A Member of the Bar of the United States Supreme Court
11 Park Place
New York, N.Y. 10007
(212) 227-0959

Dick Bailey Printers, Inc., Tel.: (212) 447-5358

TABLE OF CONTENTS

Page

The Opinion Below 1

Jurisdiction 2

Questions Presented 2

The Principal Constitutional Provisions, Statutes and Rules Involved 3

Statement of the Case 4

The Reasons For Granting This Writ 16

Conclusion 26

Appendix A 29

Appendix B 31

Appendix C 32

Appendix D 36

CASES CITED

Brady v. Maryland, 373 U.S. 83 (1963) 21

California v. Green, 399 U.S. 149 16

Giglio v. U.S., 405 U.S. 150 (1972) 21

Henry v. Mississippi, 379 U.S. 443, 447, 449 (1965) ... 23

Jenkins v. McKeithen, 395 U.S. 411 16

Kaufman v. U.S., 394 U.S. 217 (1969) 23

Moore v. Illinois, 408 U.S. 786 (1972) 21

People v. Washington, 32 N.Y. 2d 401 24

Smith v. Illinois, 390 U.S. 129 16

U.S.A. Ex Rel. Leon Washington v. Vincent etc., U.S. Court of Appeals, Second Circuit, No. 248, September 1975 Term, decided November 5, 1975, slip opinion 373 24

OTHER AUTHORITIES

Amendment 14 to the U.S. Constitution—Section 1 ... 3

28 U.S.C. — Section 2241 3

28 U.S.C. — Section 2253 3

IN THE
SUPREME COURT OF THE UNITED STATES

ALPHONSE INDELICATO,

Petitioner.

-against-

THE NEW YORK STATE BOARD OF PAROLE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Alphonse Indelicato, requests that a writ of certiorari issue to review the final order of the United States Court of Appeals for the Second Circuit, denying the petitioner's application for a certificate of probable cause allowing and affording leave to appeal to the order of the United States District Court, Southern District of New York, denying relief in a habeas corpus proceeding instituted in that court. The relief sought was to release the petitioner or vacate a judgment of conviction rendered in the then Court of General Sessions of the City of New York, a New York State Court, or to provide alternative and appropriate relief applicable to the issuance of a writ of habeas corpus.

THE OPINION BELOW

The United States Court of Appeals for the Second Circuit originally denied the application for a certificate of probable cause by order dated September 23, 1975. No opinion was rendered (Appendix A, infra). Thereafter

petitioner applied for a reargument, rehearing or reconsideration of the application for a certificate of probable cause and that was denied (Appendix B, infra).

The opinion, decision and final order of the United States District Court, Southern District of New York, denying all relief was dated July 28, 1975 (Judge Thomas P. Griesa), is reproduced herein (Appendix C, infra).

JURISDICTION

The jurisdiction of this Court is invoked, made and conferred under 28 U.S.C. 1254 (1), see also 28 U.S.C. 2253 and Rule 22(3) of the Rules of this Court.*

QUESTIONS PRESENTED

A. Was the petitioner's right to a fair trial violated when the District Attorney of New York County, who prosecuted the petitioner in the then Court of General Sessions, (replaced by the New York State Supreme Court, County of New York thereafter) for murder and attempted murder withheld evidence that he knew existed that showed that the prosecution's only important witness received favorable treatment from the State agency in regard to his license to engage in the sale of liquor and that such favorable treatment was known to the District Attorney, to the witness, and was rendered prior to the witnesses' testimony at the trial of the petitioner and were the Courts below correct in denying petitioner the right to appeal to the Circuit Court of Appeals for the Second Circuit from the order of the District Court denying relief?

---

*The District Attorney of the County of New York appeared in behalf of the respondent in all stages of this proceeding and is the proper party to be served.

THE PRINCIPAL CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

1. Amendment 14 to the United States Constitution—Section 1:

". . . ; nor shall any State deprive any person of life, liberty or property, without due process of law; . . ."

2. 28 U.S.C.—Section 2241:

"Power to Grant Writ—(a) Writs of habeas corpus may be granted by . . . , the District Courts and any Circuit Judge within their respective jurisdictions. . . ."

"(b) . . .

"(c) The writ of habeas corpus shall not extend to a prisoner unless: (a) . . . (2) . . . (3) He is in custody in violation of the Constitution all laws or treaties of the United States; or (4) . . . (5) . . .

"(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a state court of the state which contains two or more federal judicial districts, the application may be filed in the District Court of the district wherein such person is in custody or the District Court for the district within which the state court was held which convicted and sentenced him . . ."

3. 28 U.S.C.—Section 2253

"Appeals—In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the Court of Appeals for the circuit where the proceeding is had.

"An appeal may not be taken to the Court of Appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State Court, unless the Justice or Judge who rendered the order or a Circuit Justice or Judge issues a certificate of probable cause . . ."

STATEMENT OF THE CASE

This was an application instituted by the petitioner, for the issuance of a writ of habeas corpus to issue to the New York State Board of Parole, an agency of the State of New York. The basis for this application was that the State of New York, namely the then District Attorney of New York County who prosecuted the petitioner and the State Liquor Authority or the Alcoholic Beverage Control Board's New York State agencies, withheld evidence that could have been utilized by Indelicato at the trial that resulted in his conviction hereinafter described.

It is undisputed that the petitioner exhausted all State remedies and that the basis for the application was never raised and decided before in any prior applications made by Indelicato in attacking his conviction.

Nor can it be contended that if relief herein is granted, Indelicato cannot be tried again. There was only one eyewitness to the crime involved herein, that witness was and it is believed, is now alive. As a matter of fact that witness testified at the evidentiary hearing in the Supreme Court, New York County, where the issues herein were originally raised, heard and adversely decided. Therefore, if relief is granted the State of New York, it is believed, can try the petitioner.

The petitioner was originally, together with a co-defendant named DiBiasi, indicted for murder in the appropriate State Court. The petitioner was tried alone but the trial never reached fruition because the jury was deadlocked. Therefore a second trial was had and this was concluded but the petitioner was convicted not on the charged counts of the indictment but on lesser included crimes and also attempted murder in the first degree. Thus under the first count charging first degree murder, the petitioner was convicted for murder in the second degree, he was also convicted of attempted murder in the first degree. The petitioner was sentenced to a term of twenty (20) years to life on the charge of murder in the second degree and a concurrent term of 12½ to 25 years on the charge of attempted murder. At present, the petitioner is on parole.

The Supreme Court of New York County, to determine the post-conviction application, ordered an evidentiary hearing. The two principal witnesses at the hearing was one Rocco Tisi, who testified against the petitioner at the trial in chief, and a former assistant prosecutor, one Vincent Dermody, who prosecuted the case.

At the hearing two principal documents were also received in evidence, one of which (and which is the most important) was never known to petitioner or his counsel at the State trial, culminating in the convictions. That document was a written record of a statement by the trial prosecutor that Risi enjoyed a State liquor license to maintain a bar but that such license was in jeopardy because Tisi in applying for it originally failed to disclose his arrest record and that when the State Liquor Authority was considering a non-renewal of it, at the time of the second trial, the District Attorney made known to the State

Liquor Authority that the first trial jury was deadlocked and that Tisi was the State's most important witness and that the agency should withhold adverse action in regard to that renewal. And so the agency did.

Post-conviction relief was sought in the State Court on the fact that the State prosecutor, Dermody, knew of the favorable action, arranged it, and persuaded the State Liquor Authority to withhold adverse action on the renewal of Tisi's liquor license and therefore willfully concealed this from trial counsel. By agreement with the prosecutor at the post-conviction hearing, in the Supreme Court, New York County, an affidavit by petitioner's then trial counsel to the effect that he was never aware of that important record, was made part of the record of those proceedings.

Rocco Tisi, called by the petitioner, testified on direct examination that at the time of the post-conviction application he was represented by counsel who was present in Court (4)*. Tisi, at the time of the application by the petitioner, was living in Virginia Beach for the past ten to twelve years. Prior to moving to Virginia Beach Tisi lived at 141 Mulberry Street in Manhattan. He knew the petitioner (4, 5). In May 1954 Tisi appeared at the second trial of the petitioner, the first trial never having reached a verdict (5, 6).

The District Attorney who prosecuted both trials was one Vincent Dermody (6).

At the time Tisi testified at both trials, he was the owner of a bar and grill located at 124 Rivington Street in Manhattan. That bar and grill was licensed by the State Liquor Authority (New York) (7).

---

*(This refers to the pagination of the minutes of the hearing on the post-conviction application.

Before testifying at the second trial of the petitioner, Tisi received a notice from the Liquor Authority dated January 27, 1954 (7-10).

This notice was introduced into evidence as the petitioner's "Exhibit A" in evidence (10). Exhibit A stated in substance that Tisi's application for a renewal of the license would be disapproved because when Tisi originally applied for that license he failed to disclose that he was previously arrested for the charge described in said notice (11, 12). However endorsed at the bottom of this notice of cancellation or non-renewal was the following: "cc: Assistant Dis. Attorney Dermody, 155 Leonard Street, N.Y.C.".

Having thus been notified, Tisi told the police who guarded him in protective custody, to take him to Dermody. The police did take him to Dermody's office (13). There Tisi displayed this notice to Dermody and the District Attorney admitted to him that he had a copy of that. Dermody told Tisi to "relax" (14). Dermody assured Tisi that he would find out about the matter (15).

Tisi further related that he saw the Assistant District Attorney telephone and say to the person on the other end that he, Tisi, was a witness in a murder case and that Dermody asked that person to put a hold on the matter until he, Dermody, called him again because Tisi was a witness in a murder case (15-17).

When the call was completed Dermody told him that he spoke to a good friend of his who was previously an Assistant District Attorney, but that when he left the District Attorney's office he became associated with the New York State Liquor Authority (17, 18). Following this the renewal of the liquor license was not disapproved (18).

Received in evidence in the Supreme Court and as part of petitioner's case, was a writing from the State Liquor Authority; this was a stipulation entered into between the State Liquor Authority and Tisi and it was received in evidence as petitioner's "Exhibit B" (22-26). Tisi testified that he executed that stipulation (25, 26).

Continuing his testimony Tisi stated that the liquor license was never revoked or cancelled. Following the trial of petitioner Tisi maintained the bar and grill under that license to the year 1958. He was dispossessed from the premises and that was the end of the bar and grill business and the license was never revoked (26, 27).

Tisi concluded his direct examination by stating that Dermody interceded with the State Liquor Authority for him; that Dermody told him that this was to be confidential and that he, Tisi, should not divulge Dermody's intercession with the State Liquor Authority (35).

On cross examination Tisi testified that he was not paid by the petitioner to testify (35, 36). That after he was dispossessed in 1958, he let his license lapse and that he never held a liquor license after that (40, 41).

On this phase of the cross examination the State prosecutor referred to the trial of one DiBiasi. It will be recalled that DiBiasi was originally joined in the indictment with the petitioner but was tried separately because he was not available at the time of the petitioner's trial. DiBiasi, as a matter of fact, was subsequently tried. The first trial ended in an acquittal. DiBiasi's trial commenced February 1, 1961 (42). Tisi testified at DiBiasi's trial.

Tisi further testified that he moved from the premises at 118 Rivington Street where the bar was maintained to across the street and that he had the license transferred to that place (46, 47). He attempted to sell the bar and

transfer the license to a buyer who wanted to move it to 111 Second Avenue; Tisi never made an application to transfer that license (47, 48).

In regard to the notification of non-renewal and cancellation, that was dated January 27, 1954, Tisi testified that before receiving the notice, he testified before a New York County grand jury and also at the first and second trials of petitioner. Tisi identified the petitioner in 1952. This all occurred before the notice of cancellation (1952). Tisi related that Dermody told him to tell the truth (55). However Tisi added that Dermody did coach him to as to his testimony in both trials (56).

Tisi admitted that he never testified and told what he called the "ultimate truth" at petitioner's trial. "The ultimate truth" was explained by Tisi as consisting of what Dermody did about saving his liquor license (58).

Pressed further upon cross examination, Tisi stated that Dermody told him not to worry about the problem he had with the Liquor Authority and that as long as he testified nothing would happen to his license (63, 64).

After Dermody made the telephone call to a person connected with the State Liquor Authority, Dermody said that nothing would happen to his license but that this was "confidential" between them and "nobody else" (65).

Tisi was shown the stipulation dated February 26, 1954, Petitioner's Exhibit "B" at this hearing. This was not admitted in evidence in trial but was merely marked for identification on May 20, 1954 (70, 71). The District Attorney then referred to folio 666 of the trial records (71). That record disclosed that Tisi at the petitioner's trial testified that he never showed that to Dermody but did discuss it with Dermody (72, 73).

Apparently the cross examination of the District Attorney had for its purpose a showing that at trial Tisi testified that he did call Dermody but didn't testify as to that at Indelicato's trial that he went to see Dermody (74). At the hearing however Tisi testified that he also went to see Dermody about the threatened cancellation (75). Tisi was then questioned about his testimony at the trial of Indelicato found in folios 670, 674.

Tisi testified at the hearing that Dermody did not tell him to lie in Indelicato's trial but did tell him to keep his, Dermody's help confidential (79). Tisi later told Indelicato's lawyer one Matthew Selko that this was in regard to the application (81).

Tisi further testified that in 1961 he was a witness at the trial of DiBiasi. This was the last trial of DiBiasi and ended in an acquittal (82). At that time he had no liquor license (83). The stipulation whereby Tisi was allowed to enjoy the license, was received in evidence and made part of the record at the second trial of DiBiasi (84). At DiBiasi's trial and on page 426 of the trial record, Tisi testified that Dermody did not intercede for him (86, 87). He did testify that Dermody merely told him that he would inquire as to what it was all about (87).

Tisi at the hearing testified further that he tried to have Dermody "to get him off the hook, because what he told me was in confidence, maybe that's why I didn't explain . . . express myself better. Maybe to help get Mr. Dermody off the hook for helping me save my license. That's what I would have told him . . .". (88).

When confronted with his testimony at the DiBiasi trial, this disclosed that Tisi at that trial testified that he didn't know that Dermody interceded for him (90).

Tisi was then confronted with Exhibit "2" for identification which was the cancellation of his license (95). This cancellation was dated February 3, 1958 (96). Tisi testified that it did not refresh his recollection. He still insisted that his license was never cancelled (99).

The District Attorney at this hearing also confronted Tisi with People's Exhibit "3" in evidence. This was a writing signed by Tisi (100, 101). It was dated February 14, 1958 (102). Tisi testified he never read it (103, 104). Nor did this refresh Tisi's recollection that his license was cancelled (105).

After speaking to Dermody about the notice of cancellation, Tisi testified that he felt confident that the license would not be revoked (108, 109, 110, 114).

Tisi was further shown a letter signed by him and addressed to the S.L.A. and dated February 1, 1954 (110-112). Tisi testified that his brother may have sent that letter to the S.L.A. (114). Dermody did not tell him to write that letter (114). He didn't remember sending the letter (115).

The notice of cancellation which Tisi spoke about to Dermody was dated January 28, 1954 (117).

There was then put in evidence People's Exhibit "5" which was an "internal memorandum of the State Liquor Authority" (118). This was read into the record. It was dated January 29, 1954 (119-121). This internal memorandum, which was read into the record, acknowledged that on January 29, 1954 Dermody spoke to the author of the letter in regard to a notice of disapproval of a renewal of the liquor license held by Tisi. The writer of the letter acknowledged that Dermody told him that the licensee, Tisi, was a material "and only witness in a murder case which he had tried in October 1953 and in which the jury disagreed in a seven to five verdict for conviction . . ." (119).

The memorandum continued, that Dermody stated he was going to try the case in May 1954, that Tisi was in peril of his life because only one of the murderers had been apprehended and that Tisi, even while operating his business, was under police surveillance (119, 120).

The writing further continued that ". . . Mr. Dermody feels that it is essential to his case Mr. Tisi be continued in business, at least until after his trial has been finished sometime in May." (120).

It is respectfully brought to this Court's attention however, that since the close of this hearing, counsel was presented with an affidavit made by Peter F. Sabbatino sworn to April 2, 1973 (Petitioner's trial counsel). Counsel gave a copy of this affidavit to the District Attorney. It has been agreed between counsel and the District Attorney that this affidavit may be part of the record, thus obviating any application to reopen the hearing to have Mr. Sabbatino testify.

The substance of the affidavit is that Mr. Sabbatino did not read this memorandum of Deputy Commissioner Monz in regard to the liquor license of Tisi.

Mr. Sabbatino alleged that when he was trial counsel for the petitioner herein, he subpoened the file of the State Liquor Authority in regard to Tisi. Mr. Sabbatino further stated that that memorandum was not in the file and was never produced for his inspection or made available to him. As a matter of fact Mr. Sabbatino did not know the existence of that memorandum until he read it verbatim as it was spread on the minutes of the State post-conviction hearing at pages 119-121.

Furthermore, Mr. Sabbatino at no time was told by Mr. Dermody during the trial that he had interceded with the State Liquor Authority in regard to Tisi.

Tisi further testified that he did not divulge Dermody's aid because of an obligation to Dermody (139). He never told the jury that Dermody interceded for him (140).

Tisi was further questioned about the affidavit or deposition he gave to Matthew Selko, Esq., who was an attorney for Indelicato. That affidavit did not contain any allegation by Tisi that Dermody told him to keep the matter in confidence (143). Tisi however explained that a portion of the affidavit was relative to this (144, 145).

Nor did Tisi ever tell anybody before about Dermody telling him to keep that matter in confidence (148).

Tisi was interviewed by the District Attorney December 13, 1972 in regard to the said post-conviction hearing (151). He never told them about Dermody telling him to keep the matter in confidence (151).

On redirect examination Tisi testified that he attended elementary school eight years and attended high school for a year and a half (169). He was shown a document with his signature on the bottom of it (170). This is put in evidence as petitioner's Exhibit "C" (170, 171). This exhibit was a letter (171). It was allowed in evidence to show Tisi's state of mind as to whether he knew the license was cancelled (171, 172). The letter was read into the minutes and is on pages 172-175 of the minutes.

Tisi had a lawyer by the name of Fein whose office was at 2 Lafayette Street. He was retained in regard to Tisi's liquor license (175, 176).

Also in evidence was a letter from the S.L.A. dated March 7, 1959 (176). This was read into evidence and is found on pages 177-178. This exhibit was a letter sent by the S.L.A. to Tisi's lawyer Albert Fein. The substance of the letter was that the petition submitted in Tisi's behalf for

a reconsideration of the cancellation of the license, was submitted to members of the Authority during the week of March 1958. The letter continued that after considering the matter the Authority denied a request for consideration but without prejudice to any renewal of such request if Tisi indicated he had specific premises available for the operation of a restaurant business (177).

In support of petitioner's case at the hearing in the State Court, Dermody was called as a witness. He testified that he was the prosecutor in the trial of the petitioner and in the trial of DiBiasi (198). There were four trials in all (198). The first trial against Indelicato resulted in a deadlocked jury. The second trial against Indelicato resulted in the convictions hereinabove explained (198).

Dermody admitted that Tisi was the only eyewitness to the events involved (199). Further, Tisi was in protective custody for ten years (199, 200).

Dermody admitted that he knew that Tisi had a liquor license (200). Shown defendant's Exhibit "A", the notice from the S.L.A. dated January 27, 1954, Dermody admitted that he saw that before (200). He admitted he received a copy of it when he was with the District Attorney's office (200). Further, Dermody spoke to Tisi about that (200, 201).

Dermody related that after speaking to Tisi he called the S.L.A. and spoke to Michael Monz, Deputy Commissioner of the S.L.A. (201). He asked Monz to hold up the adjudication regarding the cancellation or non-renewal of Tisi's license (201). Dermody further admitted that the second trial of Indelicato was subsequent to the call (201, 202).

Dermody couldn't recall if Tisi was present when he called the S.L.A. (202).

Dermody however testified that he never told Tisi to keep silent about this (202, 203).

On cross examination Dermody testified that Monz worked in District Attorney Hogan's office (203). Dermody could not recall whether he told Tisi that he knew Monz (203).

Dermody had a further lapse of memory as to whether he asked Monz why a copy of the notice was also sent to the District Attorney (207). There was a further failure to remember by Dermody as to whether he told Tisi that he took care of the matter (208).

However, Dermody did remember that he never told Tisi to keep the matter in confidence (208).

Questioned further on cross examination Dermody related that he prepared witnesses for cross examination (209). He went over questions with Tisi prior to petitioner's second trial (210). However, he couldn't recall any conversation with Tisi about possible cross examination as to the license (210).

Dermody was then shown a part of a summation made at the trial of petitioner (212). That aspect of the summation is found in folios 1878, 1879 of the trial record of petitioner which was put in evidence after post-conviction application. Dermody's attention was directed to that portion where he told the jury that:

> ". . . well, assuming, without conceding for a moment, but assuming that that was the reason, or one of the reasons why Tisi finally did open up—and you will recall his testimony: he said it had nothing to do with it that nobody ever threatened to forfeit his license. But assuming for the moment, without conceding that is what prompted Tisi to tell what he claims now is the truth . . ."

Dermody related that it was not part of his trial strategy to conceal his help to Tisi in regard to his liquor license (217). However Dermody also admitted that he never told Tisi's trial counsel that he intervened (260).

Dermody explained his summation in regard to that portion hereinabove shown, as relating to Tisi's identification of petitioner prior to the time that Tisi's license was subject to a non-renewal or cancellation (218).

THE REASONS FOR GRANTING THE WRIT:

At the first trial of the petitioner a verdict was never reached because of a jury deadlock. The second trial resulted in the petitioner being convicted as hereinabove described. At stake in the petitioner's second trial was the right of confrontation as guaranteed by the 6th and 14th Amendments to the Federal Constitution as well as the right to effective counsel. Taken together or singly, the issue is one of due process of law under the 14th Amendment to the Federal Constitution. This involved the right to cross examine witnesses and present evidence to the trial jury. See *Smith v. Illinois*, 390 U.S. 129; *Jenkins v. McKeithen*, 395 U.S. 411; *California v. Green*, 399 U.S. 149.

Further, as was held in *Dutton v. Evans*, 400 U.S. 74, at page 88:

> " . . . From the viewpoint of the confrontation clause a witness under oath, subject to cross examination and whose demeanor can be observed by the trier of fact, is a reliable informant not only to what he has seen . . . "

The crucial witness at petitioner's trial was Tisi. Minus Tisi there would have been no evidence to have tried the petitioner. It is urged that the petitioner is arguing that Tisi's testimony was the only evidence upon which guilt could be fastened. By withholding the evidence of the State Liquor Authority's accommodation to Tisi, Indelicato was deprived of a fair trial and was deprived of due process of law. Of cardinal importance therefore, was Tisi's testimony. To evaluate Tisi's testimony objectively, the jury should have been given evidence that would bear on Tisi's motive to help the prosecutor and color the truth. The issue is not what Tisi claimed he saw. The issue is how would a trial jury evaluate Tisi's testimony in the light of the positive and affirmative aid given to him by the prosecutor as well as by the State of New York through the agency.

At the post-conviction hearing in the State Court, and presented as an exhibit to the Judge in the United States District Court, Southern District of New York, that decided this matter, the record of the trial underlying petitioner's conviction was received in evidence. Part of the cross examination of Tisi at petitioner's trial as to the liquor license, disclosed that he was initially questioned as shown in folios 483, 486 of the record of that trial, an Exhibit in this proceeding. The testimony of Tisi as to the falsification of his initial application is found in folios 487-498 of that Exhibit. The crucial cross examination of Tisi related to the withholding by Tisi of his arrest record when he applied for the license. However in so doing, there was the planned frustration by Tisi joined in by the prosecutor during his cross examination as to the "ultimate truth". Tisi was asked about his license renewal at trial and it was disclosed that he applied for this January 12, 1952 (628-629 — Folios in the trial record). Tisi admitted that he received

a letter from the State Liquor Authority. He denied that he showed this letter to Dermody, the prosecutor, but he did testify that he called the prosecutor (Dermody) and that Dermody told him that he would call the authority and find out about it (Folio 668). Tisi was then questioned as follows:

> "Q. My question is: did he tell you that he was going to intercede for you with the State Liquor Authority?
>
> "A. He said he was going to find out what it was all about.
>
> "Q. Will you answer my specific question?
>
> "A. That is the best of my knowledge.
>
> "Q. Did Mr. Dermody tell me that he was going to intercede for you with the State Liquor Authority?
>
> "A. He was going to find out means intercede? Yes, I will say yes."
>
> "Q. Did Mr. Dermody inform you that he did intercede for you?
>
> "A. He was going to intercede.
>
> "Q. Did he tell you he did intercede for you with the State Liquor Authority?
>
> "A. Yes, sir he must have." (Folios 671-672 of the trial record).

Sensing that Indelicato's trial counsel was approaching the crux of the matter, the prosecutor then interrupted the cross examination suggesting that Tisi be asked whether he knew what the word "intercede" meant. The Court suggested that also. However, it is evident that Tisi knew what the word intercede meant because he defined it. He clearly stated that if intercede meant to find out he would say yes. While this is not the full definition of the word, the

point is that when Tisi was asked whether Dermody did intercede Tisi stated:

> "A. Yes, sir, he must have." (At Folio 672).

The vital issue is not merely that Tisi was withholding the "ultimate truth". What is vital was that the prosecutor passively stood by and did not disclose that he actually interceded. It is suggested that the prosecution interrupted the cross examination not because he urged a semantic difficulty but because he wanted to sidetrack the defense.

When Tisi was questioned by the Court he replied that Dermody told him he was going to find out about the matter (at Folio 673 of the trial record). When the Court questioned Tisi in this regard Tisi flatly denied that Dermody would use his good graces, Tisi merely replying that Dermody said he would inquire about the matter (Folio 674 of the trial record).

The issue is not merely the misconduct of Tisi. The glaring prejudice was that the state prosecutor knew what he did, namely that he did intercede, that he did use his office to accommodate Mr. Tisi's licensing troubles. He had a duty to disclose this. Even the stipulation entered into between Tisi and the State Liquor Authority as to the renewal of the license, was not received in evidence because the prosecutor objected. The prosecutor's objection of course was that it contained a record of Tisi's arrest. The real issue was not the stipulation at all but the memorandum from the State Liquor Authority being a complete record of the intervening by the prosecutor with the State agency.

It is therefore put that Tisi never answered the questions fully and that Tisi and the prosecutor avoided the issues involved. Tisi's responses carefully guarded, were more of

an opinion and comment on really what did happen than an objective answer disclosing the full facts well within the knowledge of the prosecutor. And it is again stated Dermody the prosecutor, stood by and said nothing about this suppression by Tisi.

As shown hereinabove the State's exhibit 5 received in evidence at the hearing on the post-conviction application was first disclosed by the State of New York at that hearing. However the time to have disclosed this was not at the post-conviction hearing but at the trial itself. The State of New York should have this delivered to petitioner's trial attorney for whatever use he could make of it. That exhibit clearly discloses that Dermody complained to the State Liquor Authority that at the first trial of the petitioner there was a deadlocked jury. That the District Attorney wanted Tisi to be at ease in the second trial because he wanted to convict the petitioner and that he yet had to try a co-defendant who ultimately was acquitted.

This is all the more borne out when one examines the redirect examination of Tisi by Dermody at the trial.

At the hearing level in the initial stages of this proceeding, in the state court, the minutes of DiBiasi's trial, the co-defendant of the petitioner who was tried subsequently, was received in evidence. This exhibit was also part of the record before the United States District Court, Southern District. The minutes of that trial disclose that Tisi was asked whether he received a notice of cancellation and non-renewal from the Liquor Authority and his answer was that he "thought" it happened. He then admitted that he talked it over with the prosecutor, the same Dermody, but he did not ask Dermody to use his good graces. He was also asked on cross examination whether the prosecutor told him he would intercede and he

answered that the prosecutor stated that he would see about it. However at the trial of the co-defendant, Tisi was shown this stipulation as to the renewal of his license and this was actually admitted at the second trial. But during the trial of the co-defendant, Dermody, the prosecutor, still concealed the truth by making an objection to that line of questioning. It is respectfully suggested that relief should be granted based on the holdings of this Court in *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. U.S.*, 405 U.S. 150 (1972). More recently this Court decided *Moore v. Illinois*, 408 U.S. 786 (1972). There the issue was the impact of the concealment of a certain item of evidence that would have helped the defense. The defendant or petitioner in this court held the evidence was suppressed. It was held that the evidence not disclosed was not material and that there was no evidence that the prosecution or the State knowingly allowed false testimony to remain uncorrected.

It is put that the holding in *Moore* was one of realism and studied the effect and detriment by the suppression of evidence. The holding in *Moore* however points to the relief in this case. Here there was a knowing concealment by the prosecutor who was a party to the suppression of the favorable treatment of the main witness. Furthermore, the jury it would seem had a right to know this because Tisi was the only witness who could incriminate the petitioner here.

Furthermore, unlike the situation in *Moore, supra*, the prosecutor in this case actually exploited his non-disclosure. Thus petitioner's trial attorney, doing the best he could with the meager evidence disclosed to him, referred in summation to the fact that Tisi asked the prosecutor to help him out with his licensing troubles. The prosecutor objected to that stating there was no testimony. The petitioner's trial attorney then quoted testimony that

Tisi received a letter from the licensing agency as to his license and that he discussed it with the prosecutor. The trial attorney then tried to use the scanty admissions hereinabove referred to by Tisi. However the prosecutor during summation stated as follows:

> ". . . Well, assuming, without conceding for a moment but assuming that that was the reason or one of the reasons why Tisi finally did open up—and you will recall his testimony: he said it had nothing to do with it that nobody ever threatened to forfeit his license. But assuming for the moment, without conceding that is what prompted Tisi to tell what he claims now is the truth . . ."

What the prosecutor told the jury therefore was that they could speculate in the absence of any knowledge that he actually participated in helping his sole witness.

The holdings in the Courts below denying relief to the petitioner are not only against the weight of the evidence, but it is suggested are not warranted in law.

The factual issue presented was not that petitioner's trial counsel had some knowledge of Tisi's difficulties. He tried to utilize the scanty knowledge afforded to him but was frustrated. The cardinal issue was that Tisi artfully concealed that he was helped and this was corroborated by the District Attorney's thunderous silence. This it is submitted was the misconduct of the prosecutor.

There was no showing in this case that petitioner's trial attorney devised a trial strategy where the above designated facts would not be brought to the attention of the jury.

It was the prosecutor that frustrated the petitioner's right to have effective counsel. In other words, the prosecutor by the artful non-disclosure impeded the

petitioner's trial counsel from a more effective cross examination and a more effective summation to the jury.

There is nothing in this record to show that the memorandum of the state agency was part of any papers subpoened by petitioner's trial counsel. There was no showing that the petitioner's trial counsel devised a "strategy" at trial so that this artful non-disclosure by the prosecutor could have been exploited after the trial. See *Henry v. Mississippi*, 379 U.S. 443, 447, 449 (1965). In *Kaufman v. U.S.*, 394 U.S. 217 (1969) a federal prisoner instituted a post-conviction application seeking relief from his conviction in a federal court. The issue was an illegal search and seizure which trial counsel did raise. Appellant counsel did not raise that issue on appeal. The prosecutor argued that the interests of finality justified denial of the application for post-conviction relief. Yet this Court held to the contrary, reasoning that there was "no deliberate bypass" of procedural requirements, see *Kaufman v. U.S.*, *supra*, 394 U.S. 217 at page 220.

In short, there was no waiver of this facet of evidence in this case by either the petitioner or his trial counsel.

In regard to the issue raised by the respondent that the stipulation that was never received in evidence could have been received in evidence if the arrest of the prosecution's main witness were omitted from the stipulation by redaction, it is respectuflly submitted that that is not the issue at all. The stipulation by itself if in evidence may have been helpful to petitioner. But what was more important and which didn't require redaction was the prosecutor's deliberate silence as to his participation in helping his main witness. In short if there was any redaction in this case, it was redaction by the prosecutor of a vital piece of evidence, the disclosure of which may have resulted in an acquittal of the petitioner.

It is difficult to understand why the Court below closed access for review. The decision of the District Court was based on the decision of Judge Martinis, a Judge of the Supreme Court, New York County, who denied relief in the state court. However, that decision in part rested on a state case reported in *People v. Washington*, 32 N.Y. 2d 401. The defendant in that case claimed he was deprived of a fair trial because the prosecution's witness concealed the fact that he was promised favorable treatment by the prosecutor in exchange for his testimony. Of course the state prosecutor was silent when the prosecutor's witness so testified. However this was not the case and the prosecutor knew it. Having been unsuccessful in the state courts, Washington then sought relief in the United States District Court for the Eastern District of New York, applying for habeas corpus. That application was denied and Washington was allowed to appeal to the Circuit Court of Appeals for the Second Circuit. He was given relief there. See *U.S.A. Ex Rel. Leon Washington v. Vincent etc.*, U.S. Court of Appeals, Second Circuit, No. 248, September 1975 Term, decided November 5, 1975, slip opinion 373. It was noted on that appeal that Washington and his lawyer had reason to be skeptical of the witnesses' denial of a bargain with the prosecutor. On pages 383-384 of the slip opinion it was stated in part that:

> ". . . the knowing use by a state prosecutor of perjured testimony ordinarily results in a deprivation of fundamental due process, violating the 14th Amendment and requiring a new trial . . . Whether the State solicits the false testimony or merely allows it to stand uncorrected when it appears does not diminish the viability of this principle . . . ; nor does the rule lose force because the perjury reflects only upon the credibility of the witness . . . A conviction obtained through the use of testimony known by the State to be untrue must fall . . ."

It was further held that the appellate court would appraise the effect of the prosecutorial misbehavior in regard to the result of the trial and that the said court would make an "independent examination of the record".

An independent appraisal of the complete record in this case namely the trial record, and the minutes of the post-conviction application in the state court would reveal that the prosecutor's intervention with the state agency on behalf of his witness was not so "well known to petitioner's trial counsel". See decision of Judge Thomas P. Griesa, below. Thus, on pages 385 and 386 footnote 8 and 9, in Washington it was recognized by the Court of Appeals that there may have been alternative methods at trial for discovering the misconduct and the court held that that may be considered in regard to whether there should be an automatic reversal. However, it was noted in footnote 9 in part that:

> ". . . The harm in the present case was caused not so much by unawareness that Anderson's testimony may have been perjured as by inability to respond effectively in view of Levine's silence . . ."

It is difficult to understand how the petitioner here was denied all review by the Court below where the facts interlock with the facts and ruling in *Washington, supra. Washington* in making the post-conviction application had the review by a Supreme Court Judge, the Appellate Division of the Supreme Court consisting of five judges and the Court of Appeals of the State of New York consisting of seven judges.

Indelicato merely seeks some appellate review of this case within the factual context presented.

CONCLUSION

It is respectfully submitted that this petition for certiorari be granted.

Respectfully submitted,

ARNOLD E. WALLACH
Attorney for Petitioner
A Member of the Bar of the
United States Supreme Court

Appendix

APPENDIX "A"
ORDER DATED SEPTEMBER 23, 1975

UNITED STATES COURT OF APPEALS
Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 23rd day of September, one thousand nine hundred and seventy-five

---

UNITED STATES ex rel. ALPHONSE INDELICATO,

Petitioner,

-v.-

NEW YORK STATE BOARD OF PAROLE

Respondent.

It is hereby ordered that the motion made herein by counsel for the petitioner by notice of motion dated August 25, 1975 for a certificate of probable cause be and it hereby is denied.

It is further ordered that

s/Leonard P. Moore
LEONARD P. MOORE

s/Wilfred Feinberg
WILFRED FEINBERG

s/James L. Oakes
James L. Oakes

Circuit Judges

APPENDIX B

UNITED STATES COURT OF APPEALS
Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 11th day of December, one thousand nine hundred and seventy-five

---

United States ex rel. Alphonse Indelicato,
Petitioner,

v.

New York State Board of Parole,
Respondent.

It is hereby ordered that the motion made herein by counsel for the petitioner by notice of motion dated November 24, 1975 to reconsider the order of this court dated September 23, 1975 denying a certificate of probable cause and to grant a certificate of probable cause be and it hereby is denied.

s/ Leonard P. Moore
Leonard P. Moore

s/ Wilfred Feinberg
Wilfred Feinberg

s/ James L. Oakes
James L. Oakes

Circuit Judges

APPENDIX "C"

OPINION

(SAME TITLE)

GRIESA, J.

This is a petition for habeas corpus under 28 U.S.C. §2254. Petitioner Alphonse Indelicato seeks release from the supervision of the New York State Parole Board and a hearing on the facts alleged in his petition. The petition is denied.

Petitioner was tried twice for murder in the first degree and attempt to commit murder in the first degree. The jury was unable to agree on a verdict during the first trial. At a second trial, petitioner was convicted on June 30, 1954 of murder in the second degree and attempt to commit murder in the first degree. He was sentenced to twenty years to life on the murder conviction and to a concurrent 12-1/2 to 25 year term on the attempted murder conviction.

The conviction was affirmed by the appellate courts of New York State, and the United States Supreme Court denied certiorari on October 14, 1963. *Indelicato v. State of New York*, 375 U.S. 844 (1963).

An application for post-conviction relief based on an allegation that the prosecutor withheld evidence from petitioner and knowingly condoned perjury by the State's chief witness was denied on April 9, 1974 by Justice Martinis of the Supreme Court, New York County, after a full evidentiary hearing. Leave to appeal that decision to the Appellate Division, First Department was denied on May 28, 1974. Having exhausted his state remedies,

petitioner seeks relief in this court.

In essence, petitioner's application for habeas corpus restates the claims made in the state *coram nobis* proceeding.

The basic facts related to the claim are as follows. The principal witness against petitioner at the murder trial was Rocco Tisi, an eye-witness. Tisi testified for the prosecution at petitioner's first trial in October, 1953. That trial ended with a hung jury and petitioner was retried in the spring of 1954.

Prior to the commencement of the second trial, Tisi, then an owner of a bar and grill in New York County, was notified by the State Liquor Authority [SLA] that his liquor license would not be renewed because on his original application, Tisi had not disclosed that he had twice been arrested for crimes that the SLA required to be reported.

Tisi was under police protection at the time and he brought the notice to the attention of Assistant District Attorney Vincent Dermody, who was prosecuting petitioner's case. Through Dermody's intercession, the SLA agreed to stay the cancellation of Tisi's liquor license. This agreement was evidenced by a stipulation signed by Tisi and a representative of the SLA, dated February 26, 1954. The stipulation provided that the SLA would renew Tisi's license because it had been informed by the District Attorney's office that the interests of justice called for a deferment of all action by the SLA to a later date. This stipulation had been obtained by petitioner's trial counsel when he subpoenaed the SLA file on the matter, but was never introduced into evidence at petitioner's trial on the ground that it contained information on Tisi's prior criminal record. Apparently, petitioner's trial counsel did not attempt to have the stipulation admitted by redacting the portion related to Tisi's criminal record.

At the trial, Tisi was questioned as to whether Dermody intervened on his behalf with the SLA. Tisi answered that Dermody "must have" interceded, but did not admit knowing that he did.

When the respondent in the *coram nobis* proceeding subpoenaed the SLA file on the matter, it was found to contain an "Internal Memorandum" which contained additional details of Dermody's intervention with the SLA.

Petitioner claims here, as he did in the state court, that without access to this internal memorandum, which he claims he should have obtained in 1954 when he subpoenaed the SLA file, he was deprived of effective means of cross-examining the prosecution's principal witness and was thus denied his right to fully confront a witness, in violation of the Sixth and Fourteenth Amendments.

In addition, petitioner claims that Dermody allegedly condoned Tisi's perjury on the witness stand, and that the prosecutor commented unfairly on that testimony in his summation to the jury.

28 U.S.C. §2254 (d) provides that in a federal habeas corpus proceeding, the determination of fact by the State court "shall be presumed to be correct" unless the factual determination is not fairly supported by the record. After a full evidentiary hearing on the application for *coram nobis* relief at which both Tisi and Dermody testified, Justice Martinis found that there was no showing of perjury by Tisi at the trial. In regard to the claim of non-disclosure of the SLA internal memorandum, Justice Martinis properly concluded that "this was a miniscule issue of recent occurrence at the time the trial took place . . . The issue of the prosecutor's intervention was already known to the defense counsel and was put before the court and jury." It had no bearing on what the witness saw on the night of the murder.

The findings made by Justice Martinis are amply supported by the record. It is unnecessary to hold a hearing in this court, since on the facts found by Justice Martinis it is clear that petitioner has not suffered the claimed deprivation of his constitutional rights.

In regard to petitioner's claim that the prosecutor unfairly commented on Tisi's allegedly perjured testimony in his summation to the jury, I agree with respondent that the language was proper and that the prosecutor was entitled to argue that the jury should disregard the threatened loss of the liquor license by Tisi in assessing his credibility. Defense counsel had ample opportunity to try to convince the jury otherwise in his summation.

Coming finally to petitioner's claim that he was denied his constitutional right to fully confront a witness by virtue of the fact that he did not possess the SLA internal memorandum, I find this claim also without merit. The fact of Dermody's intervention with the SLA on Tisi's behalf was well known to petitioner's trial counsel who had the stipulation in his possession. As Justice Martinis pointed out, the stipulation, properly redacted, could have been offered into evidence at the trial. It can only be presumed that it was a question of trial strategy that prevented petitioner's counsel from doing so.

For the foregoing reasons, the petition for habeas corpus is denied. The alternative request for a certificate of probable cause is similarly denied.

So ordered.

Dated: New York, New York
July 28, 1975

s/Thomas P. Griesa
THOMAS P. GRIESA
U.S.D.J.

APPENDIX D

SUPREME COURT : NEW YORK COUNTY
TRIAL TERM : PART 36

THE PEOPLE OF THE STATE OF NEW YORK

-against-

ALPHONSE INDELICATO,

Defendant.

MARTINIS, J.:

A hearing was held pursuant to a motion for post-judgment relief, which, in effect, attacks the fairness of the trial of the movant by our predecessor court and raises constitutional issues hitherto not raised in the nineteen or more years that the judgment has stood.

The defendant was tried twice for murder in the first degree and attempt to commit murder in the first degree. The first trial was terminated by the failure of the jury to agree upon a verdict, and upon a second trial, held on June 30, 1954, the defendant was convicted for the crimes of murder in the second degree and an attempt to commit murder in the first degree.

The defendant was sentenced to imprisonment for a term of twenty years to life and, on the second count, to a term of twelve and one half to twenty-five years. The defendant was well represented at that trial by able counsel, and the court was presided over by the Hon. Harold A. Stevens. On April 13, 1961, this conviction was affirmed by the Appellate

Division and subsequently on December 6, 1962, by the Court of Appeals, which also reviewed and affirmed a denial without a hearing of an application by the defendant for a writ of error coram nobis. Certiorari to the United States Supreme Court was denied on October 14, 1963. Thus the judgments heretofore have been sustained upon appeal and reviewed by both State and Federal Courts. The defendant is presently on parole.

The issue at the trial of the defendant was whether he killed another person and attempted to kill Rocco Tisi.

Rocco Tisi was a complainant in the case. He was also the only eyewitness to the homicide of another person, as well as to his own attempted assassination. He testified at both the first and second trials of the defendant against the defendant and later at two trials of a codefendant who was convicted in the first trial for the same crimes and acquitted in the second after the judgment in the first trial had been reversed.

Prior to the commencement of the second trial of the movant, the State Liquor Authority (SLA) served notice on Rocco Tisi that it would not continue the liquor license under which he was operating his bar on the lower East Side in New York. Tisi was under police protection at the time, and he brought the notice to the prosecutor's attention.

Subsequently, through the intercession of the prosecutor, a State Liquor Authority Commissioner authorized the continuance of the state liquor license by means of a stipulation extending it provisionally. It appears that Tisi continued to operate his business for some years after, until it closed for other reasons.

It is the alleged suppression of this intercession by the prosecutor through the eyewitness Tisi that has been made

the focal point upon which it is claimed the judgment must be vacated.

The principal witness at the hearing for the movant was Rocco Tisi, who testified that he had never testified to the ultimate truth (S.M. p. 58), which in substance related to the District Attorney's effort to intercede on his behalf with the S.L.A. His testimony at the hearing was to some degree a recantation of part of his cross-examination at the trial. At that time, in 1954, he testified substantially that before the second trial of the defendant he received the notice; that he talked to the prosecutor, who told him he would look into it and Tisi assumed that he did, but did not know what the prosecutor had done about having his license continued. At the hearing he testified that he did know that it was through the prosecutor's efforts that his license was not revoked and that he didn't say it at the trial on cross-examination because the prosecutor had told it to him in confidence. It further appears that no effort was made by the prosecutor himself to fill in the information on the record of his active intervention on Tisi's behalf.

The contention by the movant that the prosecutor endorsed a lie on the record and deliberately misled the court and jury as to Tisi's personal knowledge of his own active intervention procuring the continuance of the license cannot be sustained unless the court finds from the evidence here adduced that the prosecutor knew Tisi was not telling the truth.

The determination of this issue devolves upon the resolution of Tisi's veracity at the time of his cross-examination at the trial. If the movant fails to show by a preponderance of the evidence that the witness was privy to what the prosecutor in fact did, that contention must fall. Tisi's testimony here, as it was stated above, amounts to

some degree of recantation of his testimony at trial with regard to an independent issue which was not relevant to the main issue at tr al.

". . . the prevailing judicial attitude is that recantation should be 'looked on with the utmost suspicion.' United States v. Troche, 213 F 2d 401, 403; United States v. Batsell, 403 F. 2d 395, 403 (8th Cir. 1968), *cert. denied*, 393 U.S. 1054; United States v. Lewis, 338 F. 2d 137 (6th Cir. 1964), cert. denied, 380 U.S. 978." (United States v. Persico No. 60-CR-147, March 15, 1972, where movant very similarly sought the vacatur of the judgment on recantation and suppression of a main witness).

Of course, it would be manifestly unfair to exclusively adopt this criterion in determining the issues that have been laid before the court at the hearing, for on this basis alone there would be no need for a hearing. In making its finding and conclusions, the court has very carefully observed the witness and scrutinized the testimony on the record. The response to questions by both sides and his often volunteered remarks at the hearing reveal a pathetic figure of a man whose life was literally broken up by the incident of being called as a state's witness in four cases by the same prosecutor, in being kept in protective custody for a period of ten years, and recently by being again called by the same prosecutor's office in regard to some other information unrelated to this hearing. For his misfortune he blames the state and its prosecutor. He is not a well man, suffering from various medical disorders, and his sensitivity threshold appears to be very weak. His inclination to please both sides, while favoring the defendant, is obvious; and his inability to recall certain events further weakens his credibility. The totality of all these circumstances and facts adduced from his testimony puts into question his motivation and therefore his veracity.

It is the considered opinion of the court that the movant has failed to sustain his burden of proof that the witness was false in some parts of the testimony, as alleged, at the second trial of Indelicato. A necessary corollary of this is that in like manner the movant has not sustained his burden that the prosecutor endorsed false testimony.

The further contention of the movant in attacking the constitutionality of the trial and the judgment, that the prosecutor did not volunteer fuller disclosure regarding the liquor license than that given by the witness, is another issue that has been raised and should be determined. In order to consider this question, regard should be had to the fact that this was a miniscule issue of recent occurrance at the time the trial took place. It had occurred more than two years after the indictment and after the termination of the first trial. The crucial issue was what the witness saw on the night of the homicide and the attempted killing. Relative to this, no claim has or had been made that Tisi's testimony was in anywise different from the testimony he had given at the first trial or before the grand jury. The issue of the prosecutor's intervention was already known to the defense counsel and was put before the court and jury. Notwithstanding the contentions of frustrations in obtaining complete disclosure from the witness, defense counsel had available to him the S.L.A. stipulation, which, properly redacted, could have been offered into evidence; and moreover, under the exigent and special circumstances of the case, could have called the prosecutor as a witness, or, in lieu of the latter, demanded stipulations as to the facts. So that at this point it became a matter of trial strategy which the experienced counsel must have rejected for whatever reason known to him.

The "suppression" relied upon by counsel is a misnomer in this case, for the word as used in criminal law signifies a

concealment of knowledge which is unavailable to the defendant or his counsel. General principles governing the production of evidence in the course of a trial seeking the final determination of issues require the adverse party to seek to elicit facts from the evidence and the witnesses he has available. The exploration and resolution of issues alleged to be important by the adverse party having knowledge of them is the function of the trial. The failure to utilize available material and testimony at a trial cannot later be converted into a claim of suppression. It is when concealment is discovered after the trial of the case and it is found that the disclosure of it might have materially affected the outcome of the trial that the court will vacate its judgment. But the failure to properly develop, adduce and elicit evidences from sources then available does not mandate such a vacatur.

Reiterating the well-known principle in United States v. Sobell, 142 F. Supp. 529, affd. 244 F. 2d 520; certiorari denied 355 U.S. 873; rehearing denied 355 U.S. 920, the court said:

> " '[It is] of the essence of orderly trials that the right to counsel accorded to defendants by the constitution be not regarded as the argument here would seem to regard it as a mere one way street such that if the strategy and tactics of his trial counsel, in determining not to raise constitutional questions prove unsuccessful, defendant . . . may many years later set it aside in order that, on another trial with another counsel, another course raising these questions may be taken and so on ad infinitum'. Bowen v. United States, 5 Cir., 1951, 192 F. 2d 515, 517, certiorari denied 1952, 343 U.S. 943, 72 S.Ct. 1036, 96 L.Ed. 1348.

". . . Time after time the courts have held that whenever knowledge was in the possession of defense counsel during trial of facts which either established the impropriety of certain evidence, or cast doubts upon its admissibiity, they are barred from raising this question on a motion to vacate the judgment.

" 'Where parties, even in a criminal case, knowingly and deliberately adopt a course of procedure which at the time appears to be to their best interest, they cannot be permitted at a later time, after a decision has been rendered adverse to them to obtain a retrial according to procedure which they have voluntarily discarded and waived.' Carruthers v. Reed, 8 Cir. 102 F. 2d 933, 938, certiorari denied 1939 307 U.S. 643."

Having failed to sustain his burden of proof of the knowing use of perjured testimony, mere nondisclosure under the circumstances stated does not support the contention of prosecutorial misconduct that would make applicable the cases cited by movant's counsel in his brief.

For the reasons stated above, the motion is in all respects denied.

Dated: April 9th, 1974

s/ J. M.
J.